LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 20 1963
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1963

No. 596

PUBLIC UTILITY DISTRICT NO. 2 OF GRANT COUNTY, WASHINGTON,

Petitioner,

against

MERRITT-CHAPMAN & SCOTT CORPORATION,

Respondent.

BRIEF OF ATTORNEY GENERAL OF THE STATE OF NEW YORK, AS *AMICUS CURIAE*, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Amicus Curiae
80 Centre Street
New York 13, New York

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

SHELDON RAAB
Assistant Attorney General

of Counsel.

249 Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

INDEX

	PAGE
Question Presented	1
Statement of the Case	2
A. Facts and Statutory Background	2
B. Opinions Below	4
Interest of the State of New York	5
ARGUMENT:	
The judgment of the Court below unjustifiably subjected funds of a state instrumentality to attachment in another state. The Court of Appeals' holding, unless it is corrected on review by this Court, will permit private litigants to seize governmental funds in advance of trial and to harass public bodies by suing them in inconvenient forums	6
Conclusion	12

CASES

Benz v. New York State Thruway Authority, 9 N. Y. 2d 486, 174 N. E. 2d 727 (1961), *cert. dismissed*, 369 U. S. 147 (1962)	3, 10
Darlington v. Mayor of City of New York, 31 N. Y. 164 (1865)	7
Davenport v. Webb, 11 N. Y. 2d 392, 183 N. E. 2d 902 (1962)	11

PAGE

Matter of Donner-Hanna Coke Corp. v. Eberhardt, 156 Misc. 41, 280 N. Y. Supp. 607 (Sup. Ct. Erie Co. 1935) 7

Doyle v. City of Astoria, 147 Misc. 127, 262 N. Y. Supp. 572 (Sup. Ct. N. Y. Co. 1932), *aff'd*, 238 App. Div. 833, 262 N. Y. Supp. 973 (1st Dept. 1933) 7, 11

Easley v. New York State Thruway Authority, 1 N. Y. 2d 374, 135 N. E. 2d 572 (1956) 3, 10

Great Northern Ins. Co. v. Read, 322 U. S. 47 (1944) .. 10

Harman v. City of Ft. Lauderdale, 134 Misc. 133, 234 N. Y. Supp. 196 (Sup. Ct. N. Y. Co. 1929) .. 7, 9, 11

Kilberg v. Northeast Airlines, 9 N. Y. 2d 34, 172 N. E. 2d 526 (1961) 10

Leonard v. City of Brooklyn, 71 N. Y. 498 (1877) 7

Morris Plan Industrial Bank v. Gunning, 295 N. Y. 324, 67 N. E. 2d 510 (1946) 10

Pearson v. Northeast Airlines, 309 F. 2d 553 (2d Cir. 1962), *cert. denied*, 372 U. S. 912 (1963) 10

Van Horn v. Kittitas County, 28 Misc. 333, 59 N. Y. Supp. 883 (Sup. Ct. N. Y. Co.), *aff'd on opinion below*, 46 App. Div. 623, 61 N. Y. Supp. 1150 (1st Dept. 1899) 7, 11

W. K. Terry & Co. v. Hyde County, 33 Ohio App. 118, 168 N. E. 562 (1929) 9

STATUTES

	PAGE
Fed. R. Civ. P. 4(e)	2, 6
New York Civil Practice Act § 182-a	3
New York Civil Practice Law and Rules § 504	3
§ 505(a)	3
New York Court of Claims Act § 10	9
§ 11	9
§ 20(3)	4
Revised Code of Washington, Title 4.16.110	3

TEXTS

6 Am. Jur. 2d, Attachment and Garnishment § 1 (1963)	8
10 Carmody-Wait, Cyclopedia of New York Practice 135 (1954)	7

Supreme Court of the United States

OCTOBER TERM, 1963

No. 596

PUBLIC UTILITY DISTRICT NO. 2 OF GRANT COUNTY, WASHINGTON,

Petitioner,

against

MERRITT-CHAPMAN & SCOTT CORPORATION,

Respondent.

BRIEF OF ATTORNEY GENERAL OF THE STATE OF NEW YORK, AS *AMICUS CURIAE*, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The Attorney General of the State of New York appears as *amicus curiae* to urge that this Court grant a writ of certiorari to review the judgment below, which substantially and adversely affected the interests of the State of New York, the State of Washington and each of the other forty-eight States of the Union.

Question Presented

May a plaintiff commence an action in New York against a public instrumentality of another State simply by attaching that instrumentality's New York bank deposits, thereby (1) obviating the need to sue the instrumentality in its home State and the corresponding duty to honor the special provisions of that State with respect to suits against

public bodies, and (2) evading the strong policies of both New York and the home State against allowing the seizure of governmental funds and against exposing public bodies to suit in distant forums?

The United States Court of Appeals for the Second Circuit, purporting to apply New York law, held that attachment of governmental funds is a valid means of beginning an action against out-of-state public instrumentalities in the New York courts. Since the newly effective amendment to Fed. R. Civ. P. 4(e) permits a plaintiff to commence a quasi-in-rem proceeding directly in a federal court and thus to by-pass any adjudication by the state courts of the validity of an attachment under state law, it is probable that this holding, unless corrected by this Court, will be taken as the governing law of the State and will expose millions of dollars of deposits held for governmental purposes to attachment in New York, and ultimately in other states, thereby depriving the public of the use of these funds and subjecting governmental bodies to suit in any forum where their funds may be found.

We submit that this question is one of overriding public importance, and that the holding of the Court of Appeals is at odds both with existing New York precedent and with New York's policies protecting its own instrumentalities and according a similar protection to instrumentalities of its sister states.

Statement of the Case

A. Facts and Statutory Background.

Respondents commenced this action in the New York courts by attaching funds of petitioner, a public instrumentality of the State of Washington, deposited in a New York bank (R. 39a-40a).* After the case was removed

* All record references are to the joint appendix filed in the United States Court of Appeals for the Second Circuit.

to the federal court, petitioner moved to vacate the warrant of attachment and the levy thereunder and to set aside service of the summons on the ground, *inter alia*, that petitioner's funds were not subject to attachment under New York law, since these funds were devoted to governmental, rather than proprietary, purposes (R. 44a-65a, 74a-114a).

Both New York and Washington have well-defined policies restricting the forum for suing public instrumentalities. In New York, many such instrumentalities may be sued only in the Court of Claims, see *Easley* v. *New York State Thruway Authority*, 1 N. Y. 2d 374, 378-79, 135 N. E. 2d 572, 574-75 (1956), and this rule is adhered to strictly. *Cf. Benz* v. *New York State Thruway Authority*, 9 N. Y. 2d 486, 174 N. E. 2d 727 (1961), *cert. dismissed*, 369 U. S. 147 (1962). Those instrumentalities which may be sued outside the Court of Claims are protected by strict venue requirements. New York Civil Practice Law and Rules § 505(a). Municipal corporations—which are treated, for purposes of governmental immunity, in the same category as petitioner (Op. 31a)*—may be sued only in the county in which they are situated. New York Civil Practice Law and Rules § 504.**. Washington also restricts the forum in which suits may be brought against its instrumentalities. Specifically, it has provided that suits against petitioner must be brought in its own county. Revised Code of Washington, Title 54.16.110. Thus, it is apparent that neither State would favor exposing a public instrumentality to suit in a distant forum.

The policies of the two States are also similar in that neither will allow attachment of public funds. Washington has exempted the petitioner's property from execution by statute (Op. 16a) and New York, by its case law, has indicated the same policy for its instrumentalities (Op. 46a).

---

* For the convenience of the Court, we have cited portions of the opinion below by referring to the pages of the petition for certiorari where these portions are reproduced.

** Before September 1, 1963, this provision was embodied in New York Civil Practice Act § 182-a.

For suits in the New York Court of Claims, attachments are permitted only by the State, not against it or its agencies. Court of Claims Act § 20(3). It is plain that neither State favors attachment—and Washington, in this instance, clearly has forbidden it.

B. Opinions Below.

The District Court decided that the attached funds were held in a governmental capacity, and it therefore granted petitioner's motion (R. 115a-126a). 207 F. Supp. 443 (S.D.N.Y. 1962).

The Court of Appeals for the Second Circuit agreed with the District Court that the attached funds were devoted to governmental purposes (Op. 33a), but it nevertheless reversed the order granting petitioner's motion. 319 F. 2d 94 (2d Cir. 1963).

The Court stated that the New York cases "cannot form a reliable basis for the formulation of the policy of the State of New York that governs the decision of this case" (Op. 30a) and held, by its "own independent analysis" (Op. 32a), that "a levy under an attachment in a *quasi-in-rem* proceeding against an out-of-state governmental instrumentality will be permitted to stand unless its effect will be substantially to interfere with the performance of the public duties of such instrumentality" (Op. 52a). It remanded the case for reexamination of the facts in light of the new principle set forth in its opinion.

Subsequently, the Court granted the parties permission to file additional briefs because "there was little or no reference" in the original briefs to some of the questions discussed in the Court's opinion (Op. 53a). After these briefs were filed, the Court adhered to its original opinion and denied a petition for rehearing (Op. 54a). A petition for rehearing *in banc* was denied, with three judges dissenting and a fourth judge not participating in the consideration of the petition (Op. 58a).

Interest of the State of New York

The interests of the State of New York have been affected substantially and adversely by the Court of Appeals' holding. In particular, the State would be injured in three vital respects.

First, it appears likely that deposits by municipalities, counties, villages and public instrumentalities of other states would be transferred from New York banks to banks in states whose law gives greater scope to the doctrine of governmental exemption. If such deposits were left in New York banks, they would be liable to attachment under the Court's holding—and it would be disadvantageous to public bodies to keep their deposits in New York under these conditions. The transfer of these public funds to banks outside New York State would be inimical to the commercial life of the State and harmful to the best interest of its people.*

Second, the deposits of public bodies of New York State itself would be subject to attachment within the State under this holding. Indeed, the Court purportedly developed its "substantial interference" test from cases which fashioned the principle of governmental immunity for municipalities within New York (Op. 46a). Since the holding determines New York local law, its effect will not only bind the lower federal courts but it is likely to set a very important precedent for the state courts, too, in matters involving New York municipalities, counties, villages and instrumentalities.

Third, deposits of New York public instrumentalities in other states may receive less protection, as a result of the

* At the close of 1962, a total of over $2,106,700,000 was deposited in New York banks by states and political subdivisions thereof. Letters, dated May 29, 1963, from C. B. Reiman, Deputy Comptroller of the Currency, U. S. Treasury, and Boris S. Berkovitch, Deputy Superintendent of Banks, N. Y. State. We are informed that there is no further break-down of this figure.

holding below. It is hardly likely that another state will accord such deposits greater protection from attachment than they would receive in New York, and it is even more unlikely that another State would accord New York's deposits greater protection than that State's public deposits would receive in New York. In such a situation, it seems probable that other states would look to New York law and would accord the deposits of New York public bodies only the residual protection from attachment embodied in the proposed principle set forth in the Court's opinion.

Finally, we would note with special emphasis that the holding below may well be the final word on New York law for many years to come. As petitioner pointed out in its petition for certiorari, at page 21, a new amendment to Fed. R. Civ. P. 4(e) now makes it possible for a plaintiff to commence a *quasi-in-rem* proceeding directly in a federal court. An attaching plaintiff will take advantage of this amendment in view of the decision below, and will avoid the State courts. In light of this fact, the interest of the State in securing a review of the holding becomes even more grave.

ARGUMENT

The judgment of the Court below unjustifiably subjected funds of a state instrumentality to attachment in another state. The Court of Appeals' holding, unless it is corrected on review by this Court, will permit private litigants to seize governmental funds in advance of trial and to harass public bodies by suing them in inconvenient forums.

We respectfully submit that the Court of Appeals erred in opening the federal courts to *quasi-in-rem* suits against governmental instrumentalities, and that this case presents a matter of great public importance.

We believe that the New York courts, if faced with the instant case, would not have exposed petitioner's funds to attachment. Under New York precedent—and the reasons which underlie it—such funds are exempt from levy. The attachment here also runs contrary to the policy of the State of Washington, which, while abjuring sovereign immunity, restricts the forum for suing public bodies and protects their funds from process. Under these conditions, New York, both in its own interest and in the spirit of comity, would have vacated the attachment herein.

(A)

As the Court of Appeals frankly recognized in its opinion (Op. 44a-45a), existing New York precedent would make the validity of the attachment turn on whether petitioner acquired the attached funds through "governmental" activities, on the one hand, or "proprietary" activities, on the other. *See Van Horn* v. *Kittitas County*, 28 Misc. 333, 59 N. Y. Supp. 883 (Sup. Ct. N. Y. Co.), *aff'd on opinion below*, 46 App. Div. 623, 61 N. Y. Supp. 1150 (1st Dept. 1899); *Doyle* v. *City of Astoria*, 147 Misc. 127, 262 N. Y. Supp. 572 (Sup. Ct. N. Y. Co. 1932), *aff'd*, 238 App. Div. 833, 262 N. Y. Supp. 973 (1st Dept. 1933); *Harman* v. *City of Ft. Lauderdale*, 134 Misc. 133, 234 N. Y. Supp. 196 (Sup. Ct. N. Y. Co. 1929); 10 CARMODY-WAIT, CYCLOPEDIA OF NEW YORK PRACTICE 135 (1954). *Cf. Leonard* v. *City of Brooklyn*, 71 N. Y. 498, 500 (1877); *Darlington* v. *Mayor of City of New York*, 31 N. Y. 164, 192-93 (1865); *Matter of Donner-Hanna Coke Corp.* v. *Eberhardt*, 156 Misc. 41, 42-43, 280 N. Y. Supp. 607, 609 (Sup. Ct. Erie Co. 1935). The Court held, however, that these cases "cannot form a reliable basis for the formulation of the policy of the State of New York that governs the decision of this case" (Op. 30a), and it went on to discuss the principles which, in its view, govern the New York cases.

We submit that the policies which govern these cases—as well as the explicit language of the cases themselves—

make it clear that the New York courts will vacate any attachment of funds held by a public body for its governmental purposes.

An attachment is an "involuntary dispossession of the defendant prior to any adjudication of the rights of the plaintiff, that is, a seizure, in advance of trial and judgment." 6 Am. Jur. 2d, *Attachment and Garnishment* § 1 (1963). Thus, there are two aspects to an attachment which militate against applying it to funds held by a public body. First, the attachment may tie up public funds for the duration of an action. The workings of a governmental unit may be stifled even though it ultimately is adjudged free of liability; and, irrespective of its liability on the merits, the funds attached may be vital for public use. Second, an attachment forces the governmental unit to litigate in the form where its funds are attached—or else forfeit these funds to the plaintiff. The public body thus is compelled either to abandon any effective policy restricting the forum in which it may be sued or to limit the areas in which it extends credits or makes deposits. Neither course, obviously, is conducive to the efficient functioning of government. To be sure, a governmental unit may not enter the realm of private activity and there claim exemption from process; but the New York rule covers this eventuality by removing the exemption in such a case. Where governmental functions are involved, however, there is a need for exemption—if state policy is not to be thwarted.

The policy considerations we have advanced are by no means hypothetical. As we have already pointed out, they are inherent in the law of both Washington and New York. And, we submit, these considerations are not met by the test of "substantial interference" proposed in the opinion below.

Contrary to the Court of Appeals' decision, the threat to public funds posed by attachment is not obviated when

funds are "set aside" (Op. 48a) to meet a particular obligation which has been fulfilled. Aside from the insuperable difficulties of determining whether or not certain funds are "essential" to the performance of public functions, there would seem to be little difference between a fund which has been "set aside" for a particular purpose and any other item of expected expenditures in the budget of a public body. If such an item should turn out to have been overestimated, would the general revenues of that body become subject to a tachment to the extent of the overestimation? Surely not; in fact, the Court's opinion clearly recognizes this (Op. 48a). Neither revenues nor expenditures can be estimated with sufficient precision to allow such a test. Such funds are to be used, as is every other asset of the petitioner, for general public functions. Any other view of such funds would turn budgetary estimates into a straitjacket for governmental units.

Neither does the Court of Appeals' proposed test avoid the threat to both the Washington and the New York policies limiting the forum for suits against public instrumentalities. Obviously, one of the aims of New York's policy restricting attachment against governmental units is the desire to avoid harassment of public bodies by subjecting them to trial in distant or inconvenient forums. See *Harman* v. *City of Ft. Lauderdale*, *supra*, 134 Misc. at 137, 234 N. Y. Supp. at 200. *Cf. W. K. Terry & Co.* v. *Hyde County*, 33 Ohio App. 118, 168 N. E. 562, 563 (1929). New York, in fact, requires that suits against certain of its instrumentalities must be brought in the Court of Claims, where there are special procedures to protect the public from ill-founded suits. See, *e.g.*, Court of Claims Act §§ 10, 11. And, as we have pointed out, suits against its municipalities are also restricted as to venue. It is unthinkable that New York would disregard Washington's policy, in light of the strength of its own interest in re-

stricting the forum for such suits. *Cf. Benz* v. *New York State Thruway Authority, supra.*

It is somewhat paradoxical that the states whose policies are at issue here, New York and Washington, are the two states who have led the way in waiving sovereign immunity. Significantly, both have seen fit to retain strong limits on attaching public property and on venue of actions against governmental bodies. It would hardly serve the cause of a more liberal view of sovereign immunity if these reasonable limitations could be evaded in an out-of-state forum. *Cf. Great Northern Ins. Co.* v. *Read*, 322 U. S. 47, 54 (1954); *Easley* v. *New York State Thruway Authority, supra*, 1 N. Y. 2d at 376-77, 135 N. E. 2d at 573. And, certainly, neither State would undermine the limitations set by the other.

(B)

We have already indicated the likelihood that New York would be guided not only by its own strong policy against the instant attachment, but also by a respect for the limitations which Washington has set for suits against its instrumentalities.

Even if the New York Court of Appeals' holding in *Morris Plan Industrial Bank* v. *Gunning*, 295 N. Y. 324, 331-32, 67 N. E. 2d 510, 513 (1946), were extended to apply New York local law to attachment of an out-of-state public instrumentality, there would be no bar to taking into account Washington policy in formulating the rule of New York law that is to govern this case. Indeed, the opinion below pointed this out (Op. 29a n.2). And the New York Court of Appeals, too, has indicated that there is no firm line between "substance" and "procedure" in choice-of-law problems; the distinction depends in each case upon New York policy. *Kilberg* v. *Northeast Airlines*, 9 N. Y. 2d 34, 41, 172 N. E. 2d 526, 529 (1961). *Cf. Pearson* v. *Northeast Airlines*, 309 F. 2d 553, 560 (2d Cir. 1962), *cert. denied*, 372

U. S. 912 (1963). In light of the similarity between New York and Washington policy, there seems little doubt but that New York would bar the instant attachment—no matter what view one takes of the choice-of-law problems in this case.

We wish to point out, finally, the inextricable relation between the success of New York's own policy and its willingness to accord respect to Washington's desire to keep governmental property from attachment and to prevent lawsuits against public bodies in forums across the continent. If New York disregards Washington's statutes, it can expect no better treatment for its instrumentalities in other states. Indeed, if the Court of Appeals' original construction of New York law is adopted, New York instrumentalities' public property will be subject to attachment in their home state—and there is little reason why other states should accord them greater protection than they are given by their home state. Under these circumstances, the New York courts would be harming their own governmental bodies and their own legislature's policies by allowing this attachment. This, they have quite clearly indicated, they will not do. *Davenport* v. *Webb*, 11 N. Y. 2d 392, 395, 183 N. E. 2d 902, 904 (1962).

Whether on grounds of New York law alone, comity or choice of law, it is obvious that the New York courts, if faced by the instant question, would vacate the attachment. The state cases—the *Van Horn*, *Doyle* and *Harman* decisions—make it perfectly clear that funds acquired by a public body through its governmental activities are not subject to levy.

CONCLUSION

For the foregoing reasons, we respectfully request that this Court grant certiorari to review the judgment below.

Dated: New York, New York, November 27, 1963.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Amicus Curiae,

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

SHELDON RAAB
Assistant Attorney General

of Counsel